IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

BRADLEY BAKOTIC and JOSEPH HACKEL,	)	
Plaintiffs,	)	
v.	)	C.A. No. N17C-12-337 WCC
BAKO PATHOLOGY LP, BPA HOLDING CORP., and BAKOTIC PATHOLOGY ASSOCIATES, LLC	)	
Defendants.	)	

Submitted: September 5, 2019
Decided: December 11, 2019

Plaintiffs' Motion for Summary Judgment – DENIED

Defendants' Motion for Partial Summary Judgment - GRANTED

MEMORANDUM OPINION

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CARPENTER, J.

Before the Court is Bradley Bakotic ("Bakotic") and Joseph Hackel's ("Hackel") (jointly, "Plaintiffs") Motion for Summary Judgment and Bako Pathology LP's ("Bako Pathology") and BPA Holding Corp.'s ("BPA") (jointly, "Defendants") Motion for Partial Summary Judgment. For the reasons set forth in this Opinion, Plaintiffs' Motion for Summary Judgment is **DENIED** and Defendants' Motion for Partial Summary Judgment is **GRANTED.**

I. FACTUAL & PROCEDURAL BACKGROUND

Bako Pathology is a Delaware partnership and BPA is a Delaware corporation.[1] Bako Pathology owns BPA and BPA is the sole member of Bakotic Pathology Associates, L.L.C. (the "Company"), a Georgia limited liability company.[2] The Company "provides clinical pathology, anatomic pathology, and dermatopathology-related services."[3] Defendants Bako Pathology and BPA own and operate a national pathology reference laboratory, known as Bako Diagnostics.[4] Plaintiffs were "senior members of the management team" who continue to hold "significant equity interests in" Bako Pathology.[5] Bakotic was the President and CEO of the Company.[6] Hackel was the Vice President and the Medical Director.[7]

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[1] Compl. ¶¶ 4-5.
[2] *Id.* ¶ 9-10.
[3] *Id.* ¶ 11.
[4] Pl.'s Opening Br. in Support of Mot. for Summ. J. at 2-3.
[5] Answ. at 2.
[6] Countercl. ¶ 20.
[7] Answ. at 2.

In 2011, in connection with their employment by the Company, Bakotic and Hackel signed an Employee Confidentiality, Non-Solicitation, and Non-Competition Agreement ("Employee Non-Competition Agreement").[8] In 2015, Plaintiffs entered into the Agreement and Plan of Merger ("Merger Agreement,") in which Bakotic and Hackel agreed to further restrictive covenants in exchange for $30,400,768.51 and $14,357,043.92, respectively, in cash and equity as part of the sale of their shares in Bako Pathology and BPA.[9] In 2016, following the merger, Bakotic and Hackel entered the Amended and Restated Limited Partnership Agreement of Bako Pathology (the "Partnership Agreement"), which contained additional non-competition provisions.[10] Pursuant to the Partnership Agreement, Bakotic and Hackel maintain significant ownership interests in Bako Pathology.[11]

Following an investigation into allegations of misconduct against Bakotic, he was removed as CEO of the Company on September 8, 2017.[12] Hackel "announced his immediate 'retirement' on September 30, 2017."[13] As they are no longer employed by the Company, it is alleged that Bakotic now "intends to form a pathology laboratory and perform both executive and medical functions on its

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[8] Compl. ¶ 13.
[9] Countercl. ¶ 12.
[10] *Id.* ¶¶ 13-19.
[11] Bakotic maintains an 11.6% interest; Hackel maintains a 3.4% interest. *See id.* ¶ 14.
[12] *Id.* ¶ 34. Plaintiffs allege that Bakotic was employed by the Company until September 13, 2017. *See* Compl. ¶ 12.
[13] *See* Countercl. ¶ 35.

behalf"[14] and Hackel "intends to continue to provide pathology services in his capacity as a physician."[15]

On October 3, 2017, Plaintiffs formed the Rhett Foundation for Podiatric Medical Education, Inc. (the "Rhett Foundation"), which Defendants claim "is prepared to compete against Defendants as Defendants also engage in educational activities and a residency program."[16] Plaintiffs represented that the Rhett Foundation was founded for educational purposes, not as a for-profit business.[17] On December 27, 2017, Plaintiffs brought suit against Defendants, seeking a declaration that their post-term covenants not to compete with Defendants are unenforceable.[18] On December 28, 2017, Bakotic registered Rhett Diagnostics, LLC, a medical laboratory, with the Georgia Secretary of State.[19] Further, Defendants allege that "Bakotic has begun advertising this medical laboratory to Defendants' clients, soliciting clients and employees for it, obtaining investors for it, and boasting that other individuals will operate it for him to circumvent his restrictive covenants."[20]

Defendants brought counterclaims against Plaintiffs, seeking a declaratory judgment that the Employee Non-Competition Agreement, the Merger Agreement, and the Partnership Agreement are operative and enforceable, as well as claims for

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[14] Compl. ¶ 19.
[15] *Id.* ¶ 22.
[16] Countercl. ¶ 42.
[17] *Id.* ¶ 44.
[18] Compl. ¶ 1.
[19] Countercl. ¶ 47.
[20] *Id.* ¶ 48.

breach of contract, breach of duty of loyalty, unjust enrichment, tortious interference, and slander. Plaintiffs maintain that these counterclaims are "meritless" and "retaliatory."[21]

On March 6, 2018, Plaintiffs moved for Judgment on the Pleadings, in part arguing that the various non-competition agreements were unenforceable pursuant to 6 Del. C. § 2707.[22] This Court denied Plaintiffs' Motion because, at that stage of the litigation, there were too many disputed issues of material facts to determine whether Section 2707 applied to Plaintiffs' activities. However, the contentions for breach of duty of loyalty, unjust enrichment, and slander were dismissed.[23]

A. The Instant Motion

On June 30, 2019, Plaintiffs filed a Motion for Summary Judgment again asserting, among other arguments,[24] that the non-compete provisions are void pursuant to 6 Del. C. § 2707.[25] This statute provides that:

> Any covenant not to compete provision of an employment, partnership or corporate agreement between and/or among physicians which restricts the right of a physician to practice medicine in a particular locale and/or for a defined period of time, upon the termination of the principal agreement of which the said provision is a part, shall be void . . . .[26]

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[21] Reply to Countercl. at 2.
[22] Pls.' Mot. for J. on the Pleadings ¶ 1.
[23] *Bakotic v. Bako Pathology LP*, 2018 WL 6601172, at *3 (Del. Super. Ct. Dec. 10, 2018).
[24] As expressed at the September 5, 2019 oral argument, this Opinion will discuss only those arguments that the Court believes are appropriate for summary judgment, as opposed to addressing the numerous issues raised in Plaintiffs' and Defendants' Motions that involve disputed material facts. *See* Oral Argument Tr. at 85 (Sept. 5, 2019).
[25] Pl.'s Br. in Support of Mot. for Summ. J. at 36.
[26] 6 Del C. § 2707.

Plaintiffs contend that Bakotic and Hackel "are indisputably 'physicians' as defined by 24 Del. C. § 1702(11)."[27] As such, Plaintiffs claim they cannot be restricted in their right to practice medicine and "the Court must declare all three non-compete provisions void as a matter of law."[28] They further argue that, since the provisions must be completely stricken, "no justification exists to allow Plaintiffs, on the one hand, to practice dermatopathology as employees, while on the other hand barring them from practicing dermatopathology as owners of their own practice."[29]

In response, Defendants argue that Section 2707 is inapplicable to Bakotic and Hackel. First, they claim that none of the agreements are "between and/or among physicians" and instead are "agreements between Plaintiffs and various non-physician and corporate entities."[30] Second, the statute requires "termination of the principal agreement" and the Partnership Agreement has not terminated; Bakotic and Hackel remain Limited Partners.[31] They further argue that Plaintiffs' work "does not constitute the practice of medicine within the meaning of Delaware law."[32] Finally, they claim that even if Section 2707 applies to their work as dermatopathologists, "it does not apply to Plaintiffs' competing Lecturing and

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[27] Pl.'s Br. in Support of Mot. for Summ. J. at 36.
[28] *Id.* at 36, 38.
[29] *Id.* at 38.
[30] Defs.' Br. in Support of Mot. for Partial Summ. J. at 21.
[31] *Id.*
[32] *Id.*

Sponsorship Activities, nor does it permit Plaintiffs to own a competing laboratory."[33]

This is the Court's decision on Plaintiffs' Motion for Summary Judgment and Defendants' Motion for Partial Summary Judgment on the application of Section 2707 to the Plaintiffs in the instant matter.

II. STANDARD OF REVIEW

In reviewing a motion for summary judgment pursuant to Superior Court Civil Rule 56, the Court must determine whether any genuine issues of material fact exist.[34] The moving party bears the burden of showing that there are no genuine issues of material fact, such that he or she is entitled to judgment as a matter of law.[35] The Court must view all factual inferences in a light most favorable to the non-moving party.[36] Where it appears that there is a material fact in dispute or that further inquiry into the facts would be appropriate, summary judgment will not be granted.[37] Additionally, "the standard for summary judgment 'is not altered'" with cross-motions for summary judgment.[38]

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[33] *Id.*
[34] Super. Ct. Civ. R. 56(c); *see also Wilm. Tru. Co. v. Aetna*, 690 A.2d 914, 916 (Del. 1996).
[35] *See Moore v. Sizemore*, 405 A.2d 679 (Del. 1979).
[36] *See Alabi v. DHL Airways, Inc.*, 583 A.2d 1358, 1361 (Del. 1990).
[37] *See Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. Super. Ct. 1962), *rev'd in part* on procedural grounds and *aff'd in part*, 208 A.2d 495 (Del. 1965).
[38] *Total Care Physicians, P.A. v. O'Hara*, 798 A.2d 1043, 1050 (Del. Super. Ct. 2001) (citing *United Vanguard Fund, Inc. v. TakeCare, Inc.*, 693 A.2d 1076, 1079 (Del. 1997)).

III. DISCUSSION

The parties fundamentally disagree about the character of this case. Plaintiffs contend that they "are doctors who want to treat patients" and have brought this suit to determine whether the various restrictive covenants prevent them from doing so.[39] In contrast, Defendants assert "this action is not about two regular doctors who simply want to resume treating patients;" instead, it is about Plaintiffs' "failure to abide by their contractual and legal obligations to Defendants," and their attempt "to build a competing business and solicit Defendants' employees and customers."[40]

The dispositive issue is whether Section 2707 applies to Plaintiffs, two Georgia physicians and executives, who agreed to restrictive covenants with Defendants, whose laboratory is located in Georgia. Importantly, the restrictive covenants contained Delaware choice of law provisions and Bako Pathology is a Delaware partnership and BPA is a Delaware corporation.

The Court believes an analysis of the recent case, *Dunn v. FastMed Urgent Care, P.C.*,[41] is instructive. In *Dunn*, the plaintiff was both a physician and an executive of an urgent care medical services provider in Arizona who agreed to a restrictive covenant that prohibited him from working in a "competitive executive

[39] Pls.'s Reply to Countercl. at 1.
[40] Answ. at 1, 3.
[41] *Dunn v. FastMed Urgent Care, P.C.*, 2019 WL 4131010 (Del. Ch. Aug. 30, 2019).

capacity," but expressly permitted practicing medicine.[42] The agreement contained Delaware choice of law and forum provisions.[43] The plaintiff argued, unsuccessfully, that Section 2707 applied to invalidate the non-competition clause.[44] The Court noted that Section 2707 was adopted "in furtherance of . . . 'protecting the physician patient relationship'"[45] so that patients are not "'deprived of the services of the physician of their choice because of an economic contract entered into between two physicians.'"[46] The restriction preventing the plaintiff from engaging in a competing executive position did not violate the statute because it did not "provoke Section 2707's protections of the physician-patient relationship;" the restriction was wholly unconnected to patient care.[47]

Largely due to the express carve out in the restrictive covenant permitting the plaintiff to practice medicine, the *Dunn* Court found that Section 2707, if applicable, was not violated.[48] In reaching that conclusion, the Court cast doubt on whether Section 2707 was even applicable to the Arizona physician because the statute provides "no indication that the General Assembly intended to regulate the practice

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[42] *Id.* at *1.
[43] *Id.*
[44] *Id.*
[45] *Id.* at *14 (quoting *Total Care Physicians, P.A. v. O'Hara*, 2002 WL 31667901, at *6 (Del. Super. Ct. Oct. 29, 2002)).
[46] *Id.* (quoting Del. S.B. 294 Syn., 132 Gen. Assem. (Del. 1983)).
[47] *Id.* at *15 (referring to legislative history of Section 2707 that stressed importance of protecting physician-patient relationship from restrictive covenants).
[48] *Id.*

of medicine in other states."[49] The statute "pertain[s] to the provision of medical services or treatment within Delaware" and there were no allegations that the Arizona physician "ever offered, performed, or was licensed to provide any medical services in Delaware."[50] The Court noted that "Section 2707 is meant to protect physician-patient relationships *within Delaware* by prohibiting restrictions on the practice of medicine *in Delaware*," not elsewhere.[51]

In order for a covenant not to compete provision to be void under Section 2707, it must be "between and/or among physicians," and it must "restrict the right of a physician to practice medicine."[52] The statute further provides that "upon the termination of the principal agreement of which the said provision is a part, [the covenant] shall be void; except that all other provisions" remain enforceable, including those related to any injury suffered by the termination of the principal agreement, such as "damages related to competition."[53]

Accordingly, the Court must first determine if the disputed agreements are between physicians. Pursuant to 24 Del. C. § 1702(11), a physician is defined as a doctor "who is registered and certified to practice medicine."[54] In relevant part, the "practice of medicine" is further defined below:

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[49] *Id.* at *14.
[50] *Id.* at *14-15.
[51] *Id.* at *15 (emphasis added).
[52] 6 Del C. § 2707.
[53] *Id.*
[54] 24 Del. C. § 1702(11).

> Rendering a written or otherwise documented medical opinion concerning the diagnosis or treatment of a person or the actual rendering of treatment to a person within the State by a physician located outside the State as a result of transmission of the person's medical data by electronic or other means from within the State to the physician or to the physician's agent.[55]

Plaintiffs hold themselves out as Dr. Bradley Bakotic, D.P.M., D.O., licensed doctor of podiatric medicine and osteopathic medicine and as Dr. Joseph Hackel, M.D., licensed medical doctor, and their qualifications are not disputed. Additionally, the doctors employed by the Company perform various diagnostic services including, "upon receiving a patient's skin or nail specimens from the patient's primary doctor, perform sophisticated tests on such specimens to render a diagnosis of disease."[56]

Although *Dunn* appears to suggest that the applicability of Section 2707 is limited to physicians providing "medical services or treatment *within* Delaware,"[57] the Court is not convinced that it can be limited as such, without further distinction. The physician's practice in *Dunn* was limited to an urgent care medical services provider in Arizona, whereas Bakotic and Hackel operated out of a laboratory in Georgia, but provided diagnostics services to patients nationally. Although it is not established whether Bakotic and Hackel have treated patients within Delaware, that they treated patients in numerous states is uncontested. It is alleged that Bakotic is

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[55] 24 Del. C. § 1702 (12)(e).
[56] Pls.' Answ. Br. in Opp'n to Defs.' Mot. for Summ. J. at 12, Ex. 13, Dr. Acker Dep. at 11-13.
[57] *Dunn*, 2019 WL 4131010 at *14 (emphasis added).

licensed to practice medicine in more than twenty states and is the only DPM in the country board certified in dermatopathology and that Hackel holds specialty boards in anatomic and clinical pathology and subspecialty boards in dermatopathology; both have practiced for more than twenty years.[58] Given Bakotic and Hackel's extensive national practice, in conjunction with the Delaware choice of law provisions in each agreement, the Court believes that the Plaintiffs' medical services constitute the "practice of medicine" pursuant to Section 2707.

However, it is less apparent whether the other parties to the agreements can be considered physicians. The Employment Agreement was executed by Bakotic and Hackel with Defendant BPA and the Company for their employment at the Company. The Merger Agreement was executed by the following entities: Bako Pathology LP, Bako Pathology Holdings Corp., BPA Merger Corp., BPA Holding Corp., and Ampersand 2011 Limited Partnership. Solely for the purposes of the non-competition provision, amendment provision, and miscellaneous provisions, the Merger Agreement is also executed individually by Bradley W. Bakotic, Joseph Hackel, and eight other individuals. The Partnership Agreement was executed by Bako Pathology GP LLC as general partner, and the following limited partners: Bradley W. Bakotic, Joseph Hackel, Consonance Bako Holdings LP, Ampersand

[58] Pl.'s Opening Br. in Support of Mot. for Summ. J. at 18.

2006 Limited Partnership, and Ampersand 2011 Limited Partnership, as well as five other individuals.

It is evident that the Employment Agreement, Merger Agreement, and Partnership Agreement are executed by Bakotic and Hackel on the one hand, arguably in their capacity as physicians. However, the other parties that executed the documents are largely corporate entities, unrelated to the practice of medicine. Accordingly, the Court finds that Section 2707 is inapplicable because the agreements at issue cannot be considered "between and/or among physicians."[59]

Further, even if the agreements were between physicians in Georgia, the Court has doubt if it would totally invalidate the non-competition provisions. Clearly, Section 2707, as stated in *Dunn*, was intended to protect the physician/patient relationship in Delaware and was not intended to manage the practice of physicians in other states. At most, the Court would believe the prohibitions found in Section 2707 would only apply to the treatment or diagnosis of Delaware patients. To hold otherwise would expand Section 2707 beyond that intended by the General Assembly. However, since the agreements here are not between physicians, the Court need not definitively decide the issue. Consequently, Section 2707 cannot be

[59] 6 Del C. § 2707.

used to invalidate Plaintiffs' non-competition agreements because the statute does not apply.

IV. CONCLUSION

For the reasons set forth in this Opinion, Plaintiffs' Motion for Summary Judgment is **DENIED** and Defendants' Motion for Partial Summary Judgment is **GRANTED**.[60]

IT IS SO ORDERED.

Judge William C. Carpenter, Jr.

[60] The Plaintiffs also raise the issue of whether a tort action, such as tortious interference, can continue if the basis for the tort is found to be the violation of a contract provision. While this is generally true, the Defendants have asserted the tortious interference claim is based on conduct separate and distinct from the contract. While the Court has doubts of the factual basis of this assertion, it will await the presentation of evidence before ruling on this issue.